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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JASON CLEMENT<sup>1</sup>

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Appeal 2016-008227  
Application 14/095,029  
Technology Center 2400

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Before ALLEN R. MacDONALD, MICHAEL W. KIM, and  
KEVIN C. TROCK, *Administrative Patent Judges*.

MacDONALD, *Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> The real party in interest is Sony Corp. Appeal Br. 2.

## STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from a Final Rejection of claims 1, 2, 5, 7, and 21–23. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

### *Representative Claim*

Representative claim 1 under appeal reads as follows (emphasis added):

1. A device comprising:

at least one non-transitory computer memory comprising instructions that when executed by at least one processor cause the processor to:

allocate, to an original user of content requiring credentials to view on a device associated with the original user, transfer credits to facilitate transferring rights in the content to a friend;

responsive to a transfer signal from the device associated with the original user, transfer at least rights to view the content to a device of the friend designated by the original user;

render the content unavailable to a device of the original user;

change a transfer credit amount in an account of the original user to account for the transferring;

present on a video display at least a refund selector selectable *to refund a transfer fee*, if any, that was previously paid when the content was purchased by the original user, a maintain selector selectable *to maintain the transfer credits in an account* of the original user for use in transferring other titles, and a purchase selector selectable *to purchase additional transfer credits* necessary to both maintain originally purchased content *and to transfer* the content to the device of the friend.

*References*

Fontijn	US 2006/0229989 A1	October 12, 2006
Siddique et al.	US 2010/0030578 A1	February 4, 2010
Reedy	US 2013/0042169 A1	February 14, 2013
Toh et al.	US 2015/0006383 A1	January 1, 2015

*Rejections*

1. The Examiner rejected claim 22 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement.
2. The Examiner rejected claim 22 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.
3. The Examiner rejected claims 1, 2, 5, 7, and 21–23 under 35 U.S.C. § 112(b) as being indefinite.<sup>2</sup>
4. The Examiner rejected claims 1, 2, 5, 21, and 23 are under 35 U.S.C. § 103(a) as being unpatentable over the combination of Toh and Siddique.<sup>3</sup>
5. The Examiner rejected claim 7 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Toh, Siddique, and Fontijn.<sup>4</sup>

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<sup>2</sup> Because separate patentability is not argued for claims 2, 5, 7, and 21–23, we select claim 1 as representative. Except for our ultimate decision, the Examiner’s § 112, second paragraph, rejection of the remaining claims is not discussed further herein.

<sup>3</sup> Separate patentability is argued for claim 1. Separate patentability is not argued for claims 2, 5, 21, and 23. Thus, the rejection of these claims turns on our decision as to claim 1. Except for our ultimate decision, this rejection of these claims is not discussed further herein.

<sup>4</sup> Separate patentability is not argued for claim 7. Thus, the rejection of this claim turns on our decision as to claim 1. Except for our ultimate decision, this rejection is not discussed further herein.

6. The Examiner rejected claim 22 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Toh, Siddique, and Reedy.<sup>5</sup>

7. The Examiner rejected claims 1, 2, 5, 7, and 21–23 under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter.<sup>6</sup>

### *Issues on Appeal*

Did the Examiner err in rejecting claim 22 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement?

Did the Examiner err in rejecting claim 22 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement?

Did the Examiner err in rejecting claim 1 under 35 U.S.C. § 112(b) as being indefinite?

Did the Examiner err in rejecting claim 1 as being obvious?

Did the Examiner err in rejecting claim 1 as being directed to non-statutory subject matter?

### ANALYSIS

We have reviewed the Examiner's rejections in light of Appellant's arguments (Appeal Brief and Reply Brief) that the Examiner has erred.

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<sup>5</sup> Separate patentability is not argued for claim 22. Thus, the rejection of this claim turns on our decision as to claim 1. Except for our ultimate decision, this rejection is not discussed further herein.

<sup>6</sup> We select claim 1 as representative. Separate patentability is not argued for claims 2, 5, 7, and 21–23. Except for our ultimate decision, the § 101 rejection of claims 2, 5, 7, and 21–23 is not discussed further herein.

*1. Written Description*

Appellant contends the Examiner erred in rejecting claim 22 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement because:

With respect to written description, in the description of Figure 4 Applicant has described the claim language at issue *verbatim*.

App. Br. 4. Appellant's assertion does little to inform this Panel as to Appellant's particular concerns with the Examiner's written description rejection. Rather, the assertion is essentially a statement that, on its face, the mere repetition of the claim language within the Specification provides written description support. We disagree. However, that does not end our analysis. We also look to whether the written description rejection is adequately supported, or is insufficient, on its face.

In support of the rejection, the Examiner cites to MPEP § 2161.01. The guidance provided in MPEP § 2161.01 I. states:

When examining computer-implemented functional claims, examiners should determine whether the specification discloses the computer and the algorithm (e.g., the necessary steps and/or flowcharts) that perform the claimed function in sufficient detail such that one of ordinary skill in the art can reasonably conclude that the inventor invented the claimed subject matter. Specifically, if one skilled in the art would know how to program the disclosed computer to perform the necessary steps described in the specification to achieve the claimed function and the inventor was in possession of that knowledge, the written description requirement would be satisfied. If the specification does not provide a disclosure of the computer and algorithm in sufficient detail to demonstrate to one of ordinary skill in the art that the inventor possessed the invention including how to program the disclosed computer to perform the claimed function, a rejection under 35 U.S.C. 112(a) or pre-AIA 35

U.S.C. 112, first paragraph, for lack of written description must be made.

MPEP § 2161.01. We do not find where the rejection provides articulated reasoning as to the skill in the art, as directed to the algorithm, needed for this particular claim. Rather, the rejection merely concludes:

Since the claim merely broadly recites providing network addresses of friends without describing in the specification the particular steps, *i.e.*, algorithm, necessary to perform the claimed function, the scope of the claim limitation is not adequately supported by the Specification and thus fails to satisfy the written description requirement.

Final Act. 16. This reasoning is insufficient to support a written description rejection under 35 U.S.C. § 112(a).

## *2. Enablement*

Appellant contends that the Examiner erred in rejecting claim 22 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement because the Examiner's *Wands* factor analysis is insufficient. App. Br. 5–6 (referencing *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988)).

We agree. “The test of enablement is not whether any experimentation is necessary, but whether, if experimentation is necessary, it is undue.” MPEP § 2164.01. “Before any analysis of enablement can occur, it is necessary for the examiner to construe the claims.” MPEP § 2164.04.

Further, lack of enablement may be shown:

[B]y making specific findings of fact, supported by the evidence, and then drawing conclusions based on these findings of fact. For example, doubt may arise about enablement because information is missing about one or more essential parts or relationships between parts which one skilled in the art could not develop without undue experimentation.

*Id.* Although we conclude that the Examiner’s articulated reasoning is sufficient to show that experimentation is required, we further conclude that the articulated reasoning is not sufficient to show that the required experimentation is undue.<sup>7</sup>

### 3. Indefiniteness

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 112(b), as being indefinite because:

Nowhere does the rejection mention *Nautilus* much less apply the correct test. For this reason, no *prima facie* case of indefiniteness has been established.

App. Br. 7. The Examiner rejected claim 1 stating

Claim 1 recites a “device” that comprises only a single hardware element, “at least one computer memory”, and the recitations render unclear which statutory category the claim is directed towards; particularly, it’s unclear whether the claim is directed towards a machine or a manufacture. The term “device” in the preamble implies that the claims are directed towards a “machine”. However, for a machine to be patent-eligible, the machine must be a concrete thing, *consisting of parts, or of certain devices and combination of devices* – that is, a machine must have plural elements.

Final Act. 17. We find both Appellant’s argument and the Examiner’s rejection wanting. First, contrary to Appellant’s argument, *Nautilus* is not the test for indefiniteness during prosecution. *See* MPEP § 2172.02 I.

Second, the essential linchpin of both the argument and the rejection is: What is the meaning of “device”? Yet, neither Examiner nor Appellant

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<sup>7</sup> Should there be further prosecution, we direct the Examiner’s attention to MPEP § 2164.08(a). All the appealed claims before us appear to cover every conceivable structure (means) for achieving the stated property (result) while the Specification discloses, at most, only those known to the inventor.



turns to a dictionary to see the normal meaning of the term. A “device” is defined as “a thing made for a particular purpose.”<sup>8</sup> Contrary to the Examiner’s implied meaning of the term, we find no requirement that a device be a machine.

#### 4. Obviousness

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 103(a) because:

[A] general teaching of a menu that can be used for “activities” related to “refunds” can mean a great many things, and it is hardly a specific teaching of a refund selector selectable to refund a transfer fee. Likewise, a general teaching about amorphous “activities” related to receipts and refunds contains no cognizable hint of a maintain selector that is selectable to do something specific that Siddique does not mention, namely, ***maintain transfer credits*** in an account of the original user for use in transferring other titles.

App. Br. 15 (emphasis added).

The user of Siddique can view transactions, pay bills, and manage receipts and refunds without ever having a clue about ***maintaining transfer credits*** much less in the specific way claimed. Likewise, the Siddique user can perform the enumerated features in Siddique without having any cognizance of a purchase selector that is selectable ***to purchase additional transfer credits*** necessary to both maintain originally purchased content ***and to transfer*** the content to the device of the friend, a concept.

App. Br. 19 (emphasis added).

We conclude, consistent with Appellant’s argument, there is insufficient articulated reasoning to support the Examiner’s findings that

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<sup>8</sup> device. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/device> (accessed: April 21, 2017).

Siddique discloses “a maintain selector selectable to maintain the transfer credits” and “a purchase selector selectable to purchase additional transfer credits necessary to both maintain originally purchased content and to transfer the content.” Therefore, we conclude that there is insufficient articulated reasoning to support the Examiner’s final conclusion that claim 1 would have been obvious to one of ordinary skill in the art at the time of Appellant’s invention.

### *5. Non-Statutory Subject Matter*

#### *A*

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 101 because:

Current PTO policy with respect to abstract idea rejections is in line with current law (*Enfish, LLC, v. Microsoft Corp.*, 2015-1244, May 2016). Specifically, current policy is reflected in the Deputy Commissioner's Memorandum of May 4, 2016 (“Formulating a Subject Matter Eligibility Rejection and Evaluating the Applicant's Response to A Subject Matter Eligibility Rejection”, hereinafter “the Memorandum”), which is consistent with *Enfish*.

App. Br. 8.

Appellant mischaracterizes the purpose of the Memorandum as “current policy.” Rather, the Memorandum at page 1 is explicit in stating “[t]he purpose of this memorandum is to provide **examination instructions** to the Patent Examining Corps relating to subject matter eligibility of claims under 35 U.S.C. § 101.” Emphasis added.

Appellant further contends:

First, according to the Memorandum, to satisfy the first Mayo step the **examiner must** identify the abstract idea as it is recited and explain why it corresponds to a concept that the

courts have identified as an abstract idea. This emphasis on not straying beyond specific examples held by courts to be abstract permeates the Memorandum: the rejection *must* identify the specific claim limitations and explain why those claim limitations set forth an abstract idea corresponding to a concept that the courts have identified as an abstract idea. The rejection must avoid relying upon language taken out of context and *must* not “go beyond those concepts that are similar to what the courts have identified as abstract ideas.” Thus, both the analytically lax habit of reformulating claims into pithy phrases and then creating, from those pithy phrases, a new class of “abstract idea” is explicitly rejected by the Memorandum.

App. Br. 8–9 (Appellant’s emphasis omitted, Panel emphasis added).

[T]he claims are directed to presenting data (as opposed to merely collecting or organizing it) in a specifically recited way, namely, a specifically recited user interface on yet another machine, a display. . . . Furthermore, the rejection violates the precepts of the Memorandum because no Supreme Court case ever has held that a machine presenting a user interface on a computer display is “abstract”. *No lower court case, to the best of Applicant’s knowledge, has held that user interfaces are “abstract”*. . . [N]owhere does the “abstract idea” announced in the rejection account for the specific [user interface] UI required by the claims.

App. Br. 9–10 (emphasis added).

Again, Appellant mischaracterizes the Memorandum. The actual language of the Memorandum is that “the Examiner should” not “the Examiner must” follow the Director’s guidance. Further, any Examiner’s failure to follow the Director’s guidance is appealable only to the extent that the Examiner has failed to follow the statutes or case law. That is, to the extent the Director’s guidance goes beyond the case law and is more restrictive on the Examiner than the case law, failure of the Examiner to follow those added restrictions is a matter for petition to the Director. We

review Appellant’s particular arguments against the case law and find no requirement in the law that restricts “abstract ideas” to only those particular concepts that the courts have already particularly identified explicitly as an abstract idea.

Further, even if we found merit to Appellant’s argued user interface restrictions, Appellant’s argument has not withstood the test of time. Our reviewing court has explicitly spoken to a graphical user interface being a purely conventional feature that does not meaningfully limit the scope of a claim. *Affinity Labs of Texas, LLC, v. DIRECTV, LLC*, 838 F.3d 1253, 1265 (Fed. Cir. 2016). The court also stated, “[t]he claim simply recites the use of generic features of cellular telephones, such as a storage medium and a graphical user interface, as well as routine functions, such as transmitting and receiving signals, to implement the underlying idea.” *Id.*, 838 F.3d at 1262.

## B

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 101 because:

Claim 1 for example recites concrete patent-eligible subject matter, namely, a computer memory with instructions on it that can be executed by another machine, namely, a processor. A machine is an “important clue” that the claim is patentable, *Bilski v. Kappos*, 561 U.S. 593 (2010)).

App. Br. 9.

Appellant mischaracterizes the Court’s *Bilski* discussion of the machine-or-transformation test. Rather than stating that “a machine” is an important clue, the Court states “the machine-or-transformation test is a useful and important clue.” *Bilski*, 561 U.S. at 604. Further, the machine-or-transformation test looks not to merely “a machine,” but rather to

“a *particular* machine or apparatus.” *Bilski*, 561 U.S. at 602 (emphasis added).

Additionally, Appellant’s argument overlooks the Court’s explicit guidance:

Stating an abstract idea “while adding the words ‘apply it’ ” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implemen[t]” an abstract idea “on ... a computer,” that addition cannot impart patent eligibility.

*Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2358 (2014).

C

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 101 because:

The rejection first alleges that the claims can be boiled down to “managing the transfer of content license between people”. But the claims do not recite “managing” or “license” at all. The putative “abstract idea” thus has been taken out of context of the language of the claims. The rejection therefore fails the requirement of identifying the abstract idea *as it is recited*.

App. Br. 9.

The examiner attempts to draw a parallel between the claims and a putative “abstract idea” of “creating contractual relationships” but nowhere do the claims recite creating contractual relationships.

App. Br. 9–10.

[T]he examiner alleges that the claims are “tantamount to creation and enforcement of an End-User License Agreement”, except that they are not. There is nothing “tantamount” to the creation and enforcement of a license in the claims. The claims

require no license at all to be in effect. They may be practiced entirely in the absence of an express or implied license.

App. Br. 10.

Essentially, Appellant is arguing it is unreasonable to expect Appellant's representative to understand the relevance to the claim limitations of the legal concepts used by the Examiner in his explanation. We disagree. First, Appellant attacks the Examiner's choice of the term "managing" to describe the claimed invention. We see no error as Appellant chooses the phrase "rights management" (Appellants' Title) to describe the disclosed invention.

Second, as to the Examiner's use of the terms "license" and "contract" to explain the "rights" being transferred in the claim, claim 1 uses the term "rights" and the Specification describes the "rights" as "entitlements to a piece of content" which are entitlements owned by a user (Spec. 2). The claim also recites a function "to purchase additional transfer credits necessary to both maintain originally purchased content and to transfer the content." As above, we see no error in the Examiner using the terms "license" and "contract" to describe what the claim is directed to. Our reviewing court has, when supported by the Specification and claim language, similarly explained claims related to financial transactions using terms not explicitly found in the claim being explained. *See In re Chorna*, 656 Fed. Appx. 1016, 1021 (Fed Cir 2016) ("[T]he claims at issue amount to nothing significantly more than the terms of a contract").

D

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 101 because:

The May 12 precedential CAFC case of *Enfish* is in accord with Appellant. As is the case with the Memorandum, the CAFC disapproves of the tactic of “describing the claims at such a high level of abstraction and untethered from the language of the claims all but ensures that the exceptions to § 101 swallow the rule.” But “overgeneralizing the claims to an extreme” lies at the heart of this rejection.

App. Br. 10 (citation omitted).

We disagree as we do not find the Examiner’s reasoning to be overgeneralized. Rather, as Appellant’s above “license” and “contract” arguments show, if anything the Examiner’s reasoning is overly specific.

Appellant further contends:

*Enfish* . . . observ[es] that claims directed to an **improvement to computer functionality are patent-eligible**, an observation sanctioning the patent-eligibility of the present claims, which improve computer functionality by providing specifically enumerated useful displays. . . .

Thus, as in *Enfish*, the present claims are not directed to fundamental economic practices or mathematical equations or well-known business practices.

App. Br. 11 (emphasis added).

**Managing content licenses** is a relatively recent phenomenon which **is not a fundamental economic activity** and which is intimately tied to computers. **A claim that addresses a business challenge that is particular to computers is patent-eligible because it “is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks”**, *DDR Holdings, supra*.

App. Br. 14–15 (emphasis added).

We disagree. Contrary to Appellant's position, we conclude that managing content rights is a fundamental economic principle (see the Examiner's discussion of Gamestop; Final Act. 23), and rights transferring is a mental concept that is simply not necessarily rooted in computer technology, as argued by Appellant.

Appellant further contends:

[T]he claims contain detailed computer-centric recitations. Consider Claim 1, which involves credentials for content viewing *on a device associated with the original user*. Claim 1 requires the transfer of credits to facilitate transferring rights in the content to a friend and responsive to a transfer signal from the device associated with the original user, transferring rights to view the content *to a device* of the friend designated by the original user. This all necessarily is computer-centric.

App. Br. 13.

Essentially, Appellant is arguing that the device limitations “associated with the original user” and “of the friend” are sufficient to render the invention “computer-centric.” We disagree. The Specification at pages 7–8 indicates that a consumer electronics (CE) device may be, for example:

a computerized Internet enabled (“smart”) telephone, a tablet computer, a notebook computer, a wearable computerized device such as e.g. computerized Internet-enabled watch, a computerized Internet-enabled bracelet, other computerized Internet-enabled devices, a computerized Internet-enabled music player, . . . a computerized Internet-enabled television (TV).

That is, Appellant's Specification states that the claimed device may be just about anything. Further, the Specification at page 11 states that a CE device can be associated with an original, purchasing user. This language, and our further review of Appellant's Specification, leads us to conclude that the



device limitations “associated with the original user” and “of the friend” do not change either the structure or function of the device. Rather, these limitations merely are labels setting forth the ownership of the particular device. Such labels do not limit the two devices (or their functions) any more than labelling the devices as a first device and a second device.

Additionally, Appellant again overlooks the Court’s *Alice* guidance. 134 S. Ct. at 2358. A mere instruction to implement an abstract idea on a computer cannot impart patent eligibility. Adding a specific limitation as to the ownership of the computer does not further limit the computer in any meaningful way.

E

Appellant contends that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 101 because, as to *Mayo* step 2:

Examples of court-defined well understood, routine, conventional claim limitations include the use of a computer to create electronic records, track multiple transactions, and issue simultaneous instructions as purely conventional computer functions. If a claim recites more functions than these, ***evidence should be required*** that skilled artisans regard such functions as routine and conventional.

Thus, it is not enough to merely allege that additional steps alone and in combination are routine and conventional; ***it must also be demonstrated, either by pointing to Applicant’s own admissions or by referencing the limited number of specific court-defined routine functions***, that such functions are routine and conventional.

The present rejection fails this test.

App. Br. 12 (emphasis added).

We do not reach whether the Examiner’s rejection fails this new restrictive notice requirement proposed by Appellant. This newly proposed test is simply not relevant to whether the Examiner has given Appellant a

reasonable notice as to the basis of the § 101 rejection. The notice requirement is set forth by 35 U.S.C. § 132.

[T]he PTO carries its procedural burden of establishing a prima facie case when its rejection satisfies 35 U.S.C. § 132, in “notify[ing] the applicant . . . [by] stating the reasons for [its] rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.” 35 U.S.C. § 132. That section “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.” *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed.Cir.1990).

*In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011).

## CONCLUSIONS

(1) Appellant has established that the Examiner erred in rejecting claim 22 as failing to comply with the enablement requirement of 35 U.S.C. § 112, first paragraph.

(2) Appellant has established that the Examiner erred in rejecting claim 22 as failing to comply with the written description requirement of 35 U.S.C. § 112, first paragraph.

(3) Appellant has established that the Examiner erred in rejecting claims 1, 2, 5, 7, and 21–23 under 35 U.S.C. § 112, second paragraph, as being indefinite.

(4) Appellant has established that the Examiner erred in rejecting claims 1, 2, 5, 7, and 21–23 as being unpatentable under 35 U.S.C. § 103(a).

(5) The Examiner has not erred in rejecting claims 1, 2, 5, 7, and 21–23 under 35 U.S.C. § 101, as being directed to non-statutory subject matter.

(6) Claims 1, 2, 5, 7, and 21–23 are not patentable.

DECISION

The Examiner's rejection of claim 22, as failing to comply with the enablement requirement of 35 U.S.C. § 112(a), is **reversed**.

The Examiner's rejection of claim 22, as failing to comply with the written description requirement of 35 U.S.C. § 112(a), is **reversed**.

The Examiner's rejection of claims 1, 2, 5, 7, and 21–23, as being indefinite under 35 U.S.C. § 112(b), is **reversed**.

The Examiner's rejections of claims 1, 2, 5, 7, and 21–23 as being unpatentable under 35 U.S.C. § 103(a) are **reversed**.

The Examiner's rejection of claims 1, 2, 5, 7, and 21–23 under 35 U.S.C. § 101, as being directed to non-statutory subject matter, is **affirmed**.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED